



Support : HR Professionals : Employment of Foreign Nationals

## FAQs - Permanent Labor Certification Regulations

### Permanent Labor Certification Regulations

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## **What is the purpose of the new PERM regs?**

The DOL amended its regulations governing the filing and processing of labor certifications applications and processing such applications. The new system requires employers to conduct recruitment before filing their applications.

The new system requires employers to conduct recruitment before filing their applications.

State Workforce Agencies (SWA) will provide prevailing wage determinations to employers, but will no longer receive or process applications. Employers will be required to place a job order with the SWA, but the job order will be processed the same as any other job order. Employers will have the option of filing applications electronically, using web-based forms and instructions, or by mail.

## **Why does the Department of Labor have to approve the employment of aliens?**

The DOL must confirm that there are not sufficient United States workers who are able, willing, qualified and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work

The employment of the alien must also not adversely affect the wages and working conditions of similarly employed United States workers. 8 USC 1182(a)(5)(A)

If the Secretary of Labor, through the Employment and Training Administration (ETA), determines there are no able, willing,

qualified and available U.S. workers and employment of the alien will not adversely affect U.S. workers, the DOL will certify to the Department of Homeland Security (DHS) by issuing a permanent alien labor certification.

### **What is the former process for obtaining an alien labor certification?**

The current process requires employer to file a permanent labor certification application with the SWA serving the area of intended employment and, after filing, to actively recruit U.S. workers in good faith for a period of at least 30 days for the job openings for which aliens are sought.

Job applicants are either referred directly to the employer or their resumes are sent to the employer. The employer has 45 days to report, either the SWA or an ETA backlog processing center the lawful reason for not hiring any referred, qualified U.S. worker. If the employer hires a U.S. worker for the job opening, the process stops at the point, unless the employer has more than one opening.

If the employer believes that able, willing, and qualified workers are not available, the application, together with the documentation of recruitment results and prevailing wage information, was sent to either an ETA backlog processing center or an ETA regional office. There, it was reviewed and a determination was made as to whether to issue the labor certification based upon the employer's compliance with applicable labor laws and regulations. If the DOL agrees, it made that certification to the DHS and Department of State by issuing a permanent labor certification.

### **What is the Schedule A?**

The Department of Labor has determined that there are not sufficient United States workers who are able, willing, qualified and available for the occupations listed on Schedule A, and that the wages and working conditions of United States workers who are similarly employed will not be adversely affected by the employment of aliens on that list. Examples are:

- physical therapists
- professional nurses
- aliens with exceptional abilities in sciences and arts, including the performing arts

### **Who may interview candidates for positions for which an employer is filing a Labor Certification Application?**

The employer's representative who interviews or considers U.S. workers for the job offered to the alien must be the person who normally interviews or considers applicants for job opportunities, such as the one offered to the alien.

### **What attestations must an employer make to the Department of Labor when it is submitting a Labor Certification Application?**

- The candidate will be offered a wage equal to or exceeding the prevailing wage.
- The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage.
- The employer has enough funds available to pay the wage or salary offered to the alien.
- The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States.
- The job opportunity does not involve unlawful discrimination by race, creed, national origin, age, sex, religion, handicap or citizenship.
- The employer's job opportunity is not vacant because of

- A strike or lockout
- Labor dispute involving work stoppage
- The job opportunity's terms, conditions and occupational environment are not contrary to federal, state or local law.
- The job opportunity has been and is clearly open to any U.S. worker.
- U.S. workers who have applied for the job were rejected for lawful, job related reasons.
- The job opportunity is for full-time, permanent employment for an employer other than the alien

### **What changes have been made with regard to prevailing wage requirements?**

Previously, employer were allowed to pay alien workers 95% of the prevailing wage because estimates of the prevailing wage were only considered to be accurate with 95% of actual wages. However, with increased precision in the determination of prevailing wages, under PERM employers are required to pay 100% of the prevailing wage. The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. The employer is not required to use any specific methodology to determine the prevailing wage and may utilize a State Employment Agency (SESA) now known as a State Workforce Agency (SWA), an independent authoritative source, or other legitimate sources of wage data.

One of the following sources shall be used to determine wage:

- A collective bargaining agreement which was negotiated at armslength between a union and the employer which contains a wage rate applicable to the occupation.
- If there is no collective bargaining agreement, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed.
- SESA or SWA

An employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application within the validity period of the prevailing wage as specified in the state's prevailing wage determination.

- In all situations where the employer obtains the prevailing wage from the SESA, the Department will accept that wage determination as correct and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination. A complaint alleging inaccuracy of a SESA prevailing wage will not be investigated.
- The employer may use an independent authoritative source in lieu of a SESA prevailing wage determination. The independent source survey must reflect the median wage of workers similarly employed in the area if intended employment if the survey provides such a median and does not provide a weighted average wage of workers similarly employed in the area of intended employment.

### **How do we determine a prevailing wage when a range of wages is paid by the employer?**

Where a range of wages is paid by the employer to individuals with similar experience and qualifications for the specific employment in question, a range is considered to meet the prevailing wage requirement so long as the bottom of the wage range is at least the prevailing wage on the LCA.

**If we have filed a new LCA for another, subsequent H-1B worker, and the prevailing wage is different, must we pay that wage to the H-1B workers who are already working for us?**

The prevailing wage determination on the later LCA does not "relate back" to operate as an update of

the prevailing wage for the previously filed LCA for the same occupational classification in the same area of employment. However, every H-1B worker is to be paid in accordance with the employer's actual wage system, and this is to receive any pay increases that system provides.

### **How is a prevailing wage determined with regard to filing a labor certification application?**

If the job opportunity is not covered by a collective bargaining agreement, the prevailing wage for the labor certification process shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey.

### **In what situations is an employer chosen wage survey accepted by the DOL?**

In each case where an employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the SWA with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the SWA to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA national office.

### **Are colleges, universities and nonprofits subject to the same prevailing wage standards as other organizations?**

In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment for an employee of an institution of higher education or an affiliated or related nonprofit entity, a nonprofit research organization, or a government research organization, the prevailing wage level takes into account the wage levels of employees only at such institutions and organizations in the area of intended employment.

### **Must I provide anyone with notice of my agency's intent to file a labor certification?**

The employer must provide notice to the bargaining representative if one exists. If one does not exist, you must post notice to your employees at the facility or location where the alien will be employed. The notice must be posted for at least 10 consecutive business days. It must be visible and in a conspicuous location. Additionally, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for recruitment of similar positions in the employer's organization.

This notice must state that: (1) It is being provided as a result of the filing of an application for permanent alien certification for the relevant job opportunity; (2) any information bearing on this application is welcome.

Notice must be provided between 30 and 180 days before the filing of the labor certification application, and it must state the rate of pay that will be offered to the employee.

### **For how long must I retain copies of the application materials that I have filed with the Department of Labor?**

Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing the application.

### **What is the basic Labor Certification Application Process?**

An employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor Application for Permanent Employment Certification (ETA form 9089). This must be filed with an ETA application processing center.

Applications filed and certified electronically must, upon receipt of labor certification, be signed by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney and or agent when they are received by the application processing center.

### **What does an employer have to include with the Labor Certification Application?**

Documentation supporting the application for labor certification should not be filed with the application. However, in the event that the certifying officer notifies the employer that its application is to be audited, the employer must furnish the required supporting documentation prior to a final determination.

### **At what point should an employer begin the recruiting process if they are planning to file a labor certification?**

If the application is for a professional occupation, the employer must conduct the recruitment steps within 6 months of filing the application for alien employment certification. The employer must maintain documentation in the event of an audit.

### **What are the steps that employers must take in the recruitment process for professional positions?**

There are two steps that every employer must take: a job order and two print advertisements. These steps are required for all positions except applications involving college or university professors selected in a competitive selection and recruitment process.

The mandatory steps must be taken at least 30 days, but not more than 180 days before the filing of the Labor Certification Application.

A job order must be placed with a State Workforce Agency serving the area of intended employment for a period of 30 days.

Placing an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for a job opportunity.

If the job involved in the application requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday advertisements, place an advertisement in the professional journal most likely to bring

responses from able, willing and qualified U.S. workers.

An employer must select three additional recruitment steps from those listed by the U.S. DOL. Only one of the three may consist of activity that solely took place within 30 days of the filing of the application. None of the steps may have taken place more than 180 days prior to the application.

- Job fairs- May be documented by brochures, newspaper advertisements, etc.
- Employer's web site- Documented by dated copies of pages from the site that advertise the occupation involved in the application.
- Job search web site other than the employer's- Documented by provided dated copies of pages from one or more websites that advertise the occupation involved in the application.
- On-campus recruiting- Documented by providing copies of the notification issued or posted by the college's or university's placement office naming the employer and the date that it conducted the interviews for employment in the occupation.
- Trade or professional organizations- Documented by providing copies of pages of newsletters or trade journals containing advertisements for the occupation involved in the application.
- Private employment firms- Documented by providing a demonstration that recruitment has been conducted by a private firm, ie. Copies of contracts and copies of advertisements.
- Employee referral program with incentives- Provide dated copies of employer notices advertising the program and specifying the incentives offered.
- Campus placement offices- Provide a copy of the employer's notice that has been provided to the campus placement office.
- Local and ethnic newspapers- Provide a copy of the page in the newspapers that contain the employer's advertisement
- Radio and TV- Provide a copy of the employer's text of the advertisement along with a written confirmation from the station stating when the advertisement was aired.

### **Are there different recruiting requirements for non-professional applicants?**

If the application is for a nonprofessional occupation, the employer must at a minimum, place a job order and two newspaper advertisements within 6 months of filing the application. The steps must be conducted at least 30 days but no more than 180 days before the filing of the application.

### **What are the requirements for newspaper advertising?**

The employer must place an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and the workers likely to apply for the job opportunity.

If the job opportunity is located in a rural area that does not have a Sunday edition, the employer may use the newspaper edition with the widest circulation in the area of intended employment. Documentation of the advertisement is done in the same way as with professional occupations.

Advertisements placed in newspapers of general circulation or in professional journals before filing the Application for Permanent Employment Certification must:

- Name the employer
- Direct Applicants to report or send resumes, as appropriate for the occupation, to the employer
- Provide a description of the vacancy specific enough to appraise the U.S. workers of the job opportunity for which certification is sought
- Indicate the geographic area of employment with enough specificity to appraise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity
- Not contain a wage rate lower than the prevailing wage rate

- Not contain any job requirements or duties which exceed the job requirements or duties listed on the ETA 9089
- Not contain wages or terms and conditions of employment that are less favorable than those offered to the alien

### **Does the employer have to prepare a report of its recruitment efforts?**

The employer must prepare a recruitment report, signed by the employer, describing the recruitment steps undertaken and the results achieved. This report should detail the number of people hired, the number of U.S. workers rejected, categorized by lawful reasons for those rejections. The officer who is assigned to review the certification application may request the U.S. workers' resumes, sorted by the reasons the workers were rejected.

### **Are there different recruiting requirements for college and university teachers?**

An employer must be able to document that an alien was selected for a job opportunity in a competitive recruitment and selection process through which the alien was found to be more qualified than any of the U.S. workers who applied for the job.

### **What type of report is required from the employer to demonstrate that the foreign teacher was the most qualified and was recruited properly?**

A statement, signed by an official who has actual hiring authority from the employer, outlining in detail the complete recruitment procedures undertaken. The statement must detail:

- The total number of applicants for the job opportunity
- The specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job
- A final report of the faculty, student and/or administrative body making the recommendation or selection of the alien
- A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date of publication, stating the job title, duties and requirements
- Evidence of all other recruiting sources utilized
- A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements

### **Can an employer opt to utilize the basic recruitment procedures instead of the special college/ university teacher procedures?**

Yes, and employer that can not or does not choose to satisfy the special recruitment procedures for a college or university teacher may avail itself to the basic process.

### **What is the basic criteria that qualifies an applicant for a job opportunity?**

A U.S. worker is qualified for the job if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on the job training.

### **What is considered to be a reasonable job requirement?**

Requirements must be those duties normally required for the occupation and must not exceed the

Specific Vocational Preparation Level assigned to the occupation as shown in the O\*Net Job Zones.

To establish a business necessity an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner.

A foreign language requirement can not be included unless it is justified by business necessity. Demonstrating business necessity for a foreign language requirement may be based upon the following:

- The nature of the occupation (i.e. Translator)
- The need to communicate with a large majority of the employer's customers, contractors or employees who can not communicate effectively in English

### **Can the employer allow the alien candidate to substitute alternative experience for the required experience?**

Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought. If the alien is already employed by the employer and the alien does not meet the primary job requirements, and only potentially qualifies for the job by virtue of the employers alternative requirements, certification will be denied unless the application states that any suitable combination of education, training or experience is acceptable.

### **How does the Department of Labor determine the employer's actual minimum requirements?**

The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity. If the alien is already employed by the employer, in considering whether the job requirements represent the employer's actual minimums, the DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee.

The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless the alien gained the experience while working for the employer in a position not substantially comparable to the position for which certification is being sought or the employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

### **What experience/training counts toward the satisfaction of an employer's minimum requirements?**

In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, the DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

### **By DOL standards, what is a "substantially comparable job"?**

This is a job or a position requiring performance of the same job duties more than 50% of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent

on various duties, organization charts and payroll records.

**What are an employer's obligations if there have been layoffs within the last 6 months?**

If there has been a layoff by the employer applicant in the area of intended employment within 6 months of filing an application involving the occupation for which certification is sought or in a related occupation, the employer must document that it has notified and considered all potentially qualified laid off U.S. workers of the job opportunity involved in the application, and the results of the notification and consideration.

A lay off is considered any involuntary separation of one or more employees without cause or prejudice.

**Are labor certification applications subject to audit?**

Review of the labor certification application may lead to an audit. Also, certain applications may be selected randomly for audit and quality control.

**If an audit is scheduled, how should an employer prepare?**

An audit letter will:

- State the documentation that must be submitted by the employer.
- Specify a date, 30 days from the date of the audit letter, by which the required documentation must be submitted.
- Advise that, if the required documentation has not been sent by the date specified, the application will be denied.

**What are the penalties that are involved with inaccurate information submitted on a labor certification application?**

If possible fraud or willful misrepresentation involving a labor certification is discovered before a final labor certification determination, the DOL will make a determination as to whether or not a criminal indictment will occur.